No. 85-495

# In The
# Supreme Court Of The United States

OCTOBER TERM, 1985

**ANSONIA BOARD OF EDUCATION, ET AL,**
*Petitioners,*

v.

**RONALD PHILBROOK,**
*Respondent.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

## BRIEF OF RESPONDENT ANSONIA FEDERATION OF TEACHERS IN SUPPORT OF PETITIONERS

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## QUESTIONS PRESENTED

1. Did the Court of Appeals err in interpreting Title VII of the Civil Rights Act of 1964, as amended, Section 701(j), 42 U.S.C. section 2000e(j) to require an employer who has reasonably accommodated the religious practices of an employee, to further accommodate such employee's religious practices by accepting any proposal of the employee which does not demonstrably result in undue hardship to the employer's conduct of his business?

2. Did the Court of Appeals err, after determining that the employer's accommodation of the employee's religious observance practices was reasonable accommodation, in inquiring whether there were other reasonable



accommodations of the employee's religious beliefs which would not create an undue hardship for the employer?

3. Did the Court of Appeals err in holding that a public school teacher established a prima facie case of religious discrimination under Title VII, where he was provided three days of leave with pay for religious observance and additional days of leave without pay for religious observance?

TABLE OF AUTHORITIES





STATEMENT OF THE CASE

The respondent Union adopts by reference the statement of the case as set forth in petitioners' brief, and supports Petitioners' position.

## SUMMARY OF ARGUMENT

The Union argues that the decision below is in error in that it construes the religious accommodation provision of Title VII to require more than reasonable accommodation.

The Second Circuit errs by misinterpreting the relationship between "reasonable accommodation" and "undue hardship". The Court found that the employer's reasonable accommodation was insufficient in that the employee's preferred accommdations might not impose "undue hardship" on the employer's conduct of its business.

Title VII prohibits employment discrimination on the basis of religion. In defining religion, Title



VII requires "reasonable accommodation" of an employee's religious practices. An employer or union which reasonably accommodates the employee's religious practices has met its obligation under Title VII. The statutory (Title VII 701(j) 42 U.S.C. section 2000e(j)) reference to undue hardship limits the reasonable accommodation obligation, it does not expand it.

An interpretation of Title VII which would require more than a "reasonable accommodation" would create an absolute right of accommodation in conflict with the establishment clause of the First Amendment. Such construction and result should be avoided as a matter of judicial policy.

## ARGUMENT

1. THE SECOND CIRCUIT ERRED IN ITS CONSTRUCTION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, SECTION 701(j), 42 U.S.C SECTION 2000e(j), BY REQUIRING THE EMPLOYER AND UNION TO MAKE MORE THAN A REASONABLE ACCOMMODATION TO EMPLOYEE'S RELIGIOUS PRACTICES.

2. THE SECOND CIRCUIT'S CONSTRUCTION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, SECTION 701(j), 42 U.S.C. SECTION 2000e(j), IS IN CONFLICT WITH THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION,



THE SECOND CIRCUIT ERRED IN ITS CONSTRUCTION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, SECTION 701(j), 42 U.S.C. SECTION 2000e(j), BY REQUIRING THE EMPLOYER AND UNION TO MAKE MORE THAN A REASONABLE ACCOMODATION TO EMPLOYEE'S RELIGIOUS PRACTICES.

The Second Circuit decision recognizes that the "...crucial issues of this case...involve interpreting the meaning of and relationship between the terms 'reasonable accommodation' and 'undue hardship'". (App. 13a) That is precisely the crucial issue before this court.

The terms "reasonable accommodation" and "undue hardship" have their origin in the definitional

section of Title VII of the Civil Rights Act of 1964, as amended, Section 701(j) /1. This definition references religion as it appears in Section 703(a), 42 U.S.C. section 2000e-2(a) as an individual factor upon which an employer may not discriminate. In effect Title VII thus prohibits an employer from discrimination against an employee because of his religious observance or practice; unless reasonable accommdation of such observance or practice would cause the employer's business undue hardship.

Unquestionably, the statute imposes a duty on an employer and/or

1/ Section 701(j), 42 U.S.C. section 2000e(j): The term "religion" includes all aspect of religious abservance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to am employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business.



union to reasonably accommodate the religious observance and practice of an employee. The issue before the Court is whether the statute requires any more than reasonable accommodation.

Clearly, the Second Circuit has found the employer and union have a greater obligation that the reasonable accommodation afforded Philbrook ("three days of paid leave and additional days of unpaid leave for religious observance...". App. 14a) This is specifically held in the opinion subject to this petition (App. 14a):

> "We presume that Ansonia's leave policy is also 'reasonable'. And if Title VII's duty to accommodate were to be defined without reference to undue hardship, we would hold that

the school board had satisfied its burden. The duty to accommodate, however, cannot be defined without reference to undue hardship. In many circumstances, more than one accommodation could be called 'reasonable'. Where the employer and employee each propose a reasonable accommodation, Title VII requires the employer to accept the proposal the employee prefers unless that accommodation causes undue hardship on the employer's conduct of his business."

The Second Circuit has thus negated the statutory "reasonable" modifier to the duty to accommodate, by requiring that the employer accept any employee proposed accommodation which



would not demonstrably cause undue hardship to the conduct of the employer's business.

The decision of the Second Circuit below conflicts directly with the Tenth Circuit decision in Pinsker v. Joint District number 28J, 735 F. 2d 388(10th Cir. 1984).

The Respondent-Plaintiff attempts to distinguish the cases on the basis of the use of two days of personal leave for religious observance in Pinsker, supra as opposed to the use of three days of religious leave for religious observance in Philbrook v. Ansonia, 757 F. 2d 476(2d Cir. 1985).

The distinction is meaningless as it affects the critical issues of a Title VII "prima facie" case of religious discrimination and the

construction of the reasonable accommodation provisions of Title VII.

In both Pinsker and Philbrook the Complainants, both public school teachers were given unpaid leave after exhaustion of respectively two and three days of paid leave for religious observance.

The Tenth Circuit specifically found at 735 F. 2d 391 that Pinsker had failed to make a prima facie showing of discrimination. The Second Circuit found on nearly identical legally operative facts that Philbrook had made a prima facie case of religious discrimination under Title VII (see Petition Appendix page 14a).

The conflict is further apparent in the Circuit's construction of the "reasonable accommodation" requirement



under Title VII. The Tenth Circuit specifically found in Pinsker, supra that a leave policy providing two days of paid leave for religious observance and additional days of unpaid leave constituted a reasonable accommodation. The Second Circuit in Philbrook (Appendix to Petition 14a) concluded:

> "We presume that Ansonia's leave policy is also "reasonable."".

The Tenth Circuit construing the "reasonable accommodation" and "undue hardship" provisions of Title VII in the disjunctive held at 735 F. 2d 390:

> "Simply put, Title VII requires reasonable accommodation or a showing that reasonable accommodation would be an undue hardship on the employer."

This is precisely the

reconciliation of these terms "reasonable accommodation" and "undue hardship" which this Court should adopt. It is the only construction of the statute which will not create an absolute right of accommodation for religious observation or practice in conflict with the establishment clause of the First Amendment to the United States Constitution. It would also avoid litigation such as the instant case, involving tripartite conflict over what is essentially $1,700 worth of damages over an eighteen year period.

The Sixth Circuit in McDaniel v. Essex International, Inc., 571 F. 2d 338 (1978) construed Title VII in this fashion. The Court held that once a



determination had been made that the employer had reasonably accommodated the employee's religious beliefs and practices, then it was not necessary to consider alternative accommodations and their "undue hardship" on the employer, 571 F 2d at 341. The issue of "undue hardship" should only be considered when the employer has been unable to reasonably accommodate the employee.

The construction of the "reasonable accommodation" and "undue hardship" provisions by the Second Circuit are articulated (Appendix page 14a) in its decision:

"We presume that Ansonia's leave policy is also "reasonable."

The Second Circuit's decision goes

on to note (Appendix 15a) that their analysis has never been previously articulated, but allege consistent interpretation citing Brener v. Diagnostic Center Hospital, 671 F. 2d 141 (5th Cir. 1982). (Though cited by the Second Circuit as supporting its construction of Title VII, the decision in Brener involved a termination case for failing to report on a day of religious observance. The unquestioned prima facie case in Brener required the Court to discuss whether reasonable accommodation was possible.)

The Fifth Circuit decision in Brener v. Diagnostic Center Hospital, 671 F. 2d 141 (1982) not only does not articulate the analysis of the Second Circuit, but suggests a construction



of the "reasonable accommodation" language of Title VII, entirely consistent with the decisions of the Tenth Circuit in Pinsker v. Joint District Number 28J, 735 F. 2d 388 (10th Cir. 1984) and the Sixth Circuit in McDaniel v. Essex International, Inc., 571 F. 2d 388, 341, (1978)

Consistant with its analysis, the Second Circuit went on to consider whether despite the employer's reasonable accommodation, the employee's proposal could be met without undue hardship on the employer. Despite this Court's clear articulation of "undue hardship" in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) the Second Circuit went on to find no undue hardship under

alternative accommodations proposed by the employee.

In Brener the Fifth Circuit held at 671 F. 2nd 146:

> "Although the statutory burden to accommodate rests with the employer, the employee has a correlative duty to make a good faith attempt to satisfy his needs through means offered by the employer. A reasonable accommodation need not be on the employees' terms only."

The Court having concluded that Brener had established a prima facie case (he was terminated for refusing to show up for work on a religious holiday), considered whether the employer had "reasonably accommodated" his religious practices. In determining whether the



employer had attempted to reasonably accommodate Mr. Brener the Fifth Circuit considered the employee's proposed solutions; and found that they would have a detrimental impact on the the employer's business.

It is not apparent from such decision that the Fifth Circuit would have on the facts of the instant case (the only discipline alleged is the unpaid leave for the days not worked) gone beyond a finding of reasonable accommodation.

Contrary to the decision of the Fifth Circuit, logic and the Constitution the Second Circuit would require accommodation on the employees' terms only.

The only decision which is actually supportive of the Second

Circuit construction of "reasonable accommodation" and "undue hardship" is that of the Eighth Circuit in Hardison v. Trans World Airlines, Inc. 527 F2d 33 (1975), which decision was reversed by this Court for precisely that construction in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, (1977).

In its Trans World Airlines decision the Eighth Circuit at 527 F 2d, 41 states in footnote 10 that:

> ",..we are not concerned with whether TWA's posture with respect to such religious holdiays was a reasonable accommodation."

The application of the "reasonable accommodation" and "undue hardship" provisions of Title VII, involves an initial determination of whether the



employer has reasonably accommodated the employees' religious beliefs and practices. If the employer has reasonably accommodated such interests, the analysis goes no further. If the employer has been unable to reasonably accommodate the religious practices, the issue then becomes whether the proposed accommodations would impose undue hardship on the employer's business. The Second Circuit in its decision below, requires an employer, whether or not they have reasonably accommodated the employees' religious practices; to determine whether any of the employees' proposed accommodations would impose an undue hardship on the employer's business. The Fifth Circuit in Brener v. Diagnostic Center Hospital, supra, suggests that undue

hardship is the measure of whether the employer has reasonably accommodated its employees' religious practices. The Fifth Circuit contrary to the Second Circuit, finds a "correlative duty" of the employee to make a good faith attempt to satisfy his needs through a means offered by the employer.

The Tenth Circuit and Fifth Circuit decisions seem consistent with this Court's holding in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977) wherein there was a discharge for refusal of the employee to report on a day in which he observed his religious practices. The District Court Decision in Hardison v. Trans World Airlines, Inc., 375 F. Supp. 877 (W.D. MO 1974) ultimately upheld by this Court in Trans World Airlines,



Inc., supra, involved a finding that the employer had attempted reasonable accommodations, and that further accommodations would have worked an undue hardship.

In view of the apparent conflict between the Circuits it is neccessary that this Court specifically address the issue of the application of the standards of "reasonable accommodation" and "undue hardship" under Title VII.

THE SECOND CIRCUIT'S CONSTRUCTION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, SECTION 701(j), 42 U.S.C. SECTION 2000(e)(j), IS IN CONFLICT WITH THE ESTABLISHMENT CLAUSE OF THE FIRST AMENDMENT OF THE UNITED STATES CONSTITUTION.

This Court in its recent decision in Estate of Thornton v. Caldor, Inc.

U.S. , 105 S.Ct. 2914 (1985) reaffirms that a statute in order to pass constitutional muster under the establishment clause, must not only have secular purpose and not foster excessive entanglement of government with religion; but its primary effect must not advance religion. Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971). The



Connecticut Statute which created an absolute accommodation requirement with respect to "Sabbath" observance was found to have promoted or advanced religious practices.

In her concurring opinion Justice O'Connor (with whom Justice Marshall joined) noted at 105 S. Ct. 2919 in dicta that Title VII should stand constitutional muster under the establishment clause since it calls for a reasonable rather than absolute accomodation.

If the employer must not only reasonably accommodate the employee's religious practice; but go further and accept any proposal by the employee with respect to accommodation, unless the employer can establish that it

would cause "undue hardship" to its business; the advancement of religion is clearly at issue.

If the employer under Title VII is obligated to provide to employees additional benefits because of their religious practices (additional days leave, the right to work other than during the normal work week or work year) discrimination in the form of termination because of religious practices, or substantial interference with religious practices is not involved. What is at issue is a governmental requirement that facilitates religious practices and "advances" religion. This is clearly prohibited by the establishment clause.



This Court in Trans World Airlines, Inc. v. Hardison, 432 U.S. 63 (1977), noted specifically that to require an employer to honor the Sabbath days by incurring extra costs would constitute a "privilege...allocated according to religious beliefs", 432 U.S. at 84-85.

Privileges assigned by the state on the basis of religious belief are clearly inconsistent with the establishment clause, Estate of Thornton v. Caldor, Inc., 105 S. Ct. 2914 (1985).

## CONCLUSION

The respondent union and its individual officers advocate the construction of Title VII's religious accommodation sections in a manner which will be in conformity with the First Amendment, impose a comprehendible standard of reasonable accommodation, and avoid protracted tripartite litigation.

The decision of the Second Circuit should be reversed with judgment directed for the petitioners, the Ansonia Board of Education and its



individual members; and the Ansonia Federation of Teachers and its individual officers.

Respectfully Submitted,

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